N. V. DE BATAAFSCHE PETROLEUM MAATSCHAPPIJ & ORS. v. THE WAR DAMAGE COMMISSION

[C. A. (Whyatt C.J., Mathew C.J. (F.M.) & Whitton J.) April 13, 1956]

[Singapore — Civil Appeal No. 29 of 1955]

International Law — Seizure and exploitation of oil resources by Japanese Armed Forces — Whether valid — Private property — Crude oil immovable raw material — Munitions-de-guerre — Hague Regulations, Article 53 — Captured petroleum stocks in Singapore — Whether war booty.

Oil concessions in Sumatra — Exclusive right to explore and exploit for oil — Sole right of disposal — Physical control and possession of oil in situ — Municipal law.

Conflict of Laws — Netherlands East Indies law — English law — Whether oil in situ res nullius — Specificatio — Lex fori — Compensation under Singapore Essential Regulations, 1946.

Evidence — Foreign statute — Contradictory expert opinion — Construction.

By a concession in 1907 and subsequent concessions thereafter the Netherlands East Indies Government under its Mining Law, 1891, as amended, granted to the three appellant companies "the exclusive right to explore and exploit petroleum and the sole right to dispose of it in the concession areas for a specified number of years" in the island of Sumatra. The appellant companies were incorporated in Holland. Prior to the outbreak of the hostilities with Japan, they carried on the business of producers and refiners of oil. They owned two large oil refineries in Sumatra. By the end of 1941, they were producing crude oil in commercial quantities from the reservoirs under the said concessions, which still had substantial periods to run, and were refining crude oil on a large scale in their refineries. These field installations and the refineries were badly damaged as part of the Netherlands East Indies Government's policy of denial before the capture of Sumatra by the Japanese armed forces; but, by the end of the first year of Occupation, the Japanese had repaired the damage and crude oil was once more being extracted from the oil reservoirs under the concessions and being processed in the appellants' refineries throughout the Occupation. The Japanese military authorities, however, did not bring any new oilfields into production. The oil so extracted was shipped as refined products, and sometimes as crude, to Singapore where it was eventually forwarded to various destinations for Japanese military and civilian purposes. The Japanese military authorities did not requisition the crude oil under the Hague Regulations. When the British re-occupied Singapore on the 5th September, 1945, they found large quantities of petroleum stocks and seized them as war booty. It was not disputed that the petroleum stocks had been obtained from the said oil fields and refined in the appellants' refineries. The Companies' claim for compensation approximately $5,000,000 in respect of the value of the aforesaid stocks seized was dismissed by the Board constituted under the Singapore Essential Regulations, 1946.

Against that decision the companies appealed.

Held: (i) as to the ownership of the oil the municipal law to be applied was the domestic law of the Netherlands East Indies which law is presumed to be the same as English law unless differences between the two are alleged and satisfactorily established;

(ii) minerals (including petroleum) *in situ* in English law, are not a *res nullius*, and as the respondents had failed to prove satisfactorily the differences alleged to exist between English and Netherlands East Indies laws it is presumed to be the same as English law (**Borys**[2] case doubted; **Burma Oil**[1] case distinguished);

(iii) the appellants, on the facts, had physical control and actual possession of the oil in the reservoirs at the outbreak of hostilities, which combined with the sole right to dispose of it gave them as complete a title to the oil *in situ* as it was possible for any one to have during the period of concession;

(iv) the seizure and subsequent exploitation by the Japanese armed forces of the oil resources of the appellants, were in violation of the laws and customs of war and consequently did not operate to transfer the appellants' title to the belligerent occupant (extending the principle in **In re Flick**[5]);

(v) crude oil, being an immovable raw material was not "susceptible of direct military use' to bring it within the meaning of "*munitions-de-guerre*" in Article 53 of the Hague Regulations (*dictum* of Lord Simon in **Schiffahrt-Treuhand v. Procurator-General**[8] at p. 262 followed);

(vi) the Japanese failure in giving an official acknowledgement to the Custodian of Enemy Property said to have been appointed by them to represent absent owners was an infringement of Article 53 of the Hague Regulations and thus rendered the seizure invalid (**Billotte's**[9] case and **Henrichsen's**[10] case followed);

(vii) the right of the belligerent occupant to use "*munitions-de-guerre*" ceases with the cessation of hostilities and the appellants were entitled to require the belligerent occupant to hold those surplus petroleum stocks *in esse* on their behalf until such time as they could be restored in accordance with the provisions of Article 53 of the Hague Regulations;

(viii) English Law does not recognise the doctrine of *specificatio* and consequently ownership in crude oil would not be extinguished by process of refining; and

(ix) as Article 606 of the Netherlands East Indies Civil Code, which embodies the doctrine of *specificatio*, is irreconcilable with the Hague Regulations, which form part of the Netherlands East Indies law, the latter prevails, so that a belligerent occupant could not therefore avail himself of Article 606.

The principle on the construction of foreign statutes laid down by Lord Greene in **Rouyer Guillet & Co. v. Rouyer Guillet & Co. Ltd.**[16] followed.

Quaere: whether in a war of aggression the aggressor state can in any circumstances acquire any legal title under the Hague Regulations.

Semble: it is contrary to public policy for a British Court to recognise a foreign law which confers validity on illegal acts committed by a belligerent occupant in violation of the Hague Regulations.

Cases referred to:—

(1) *U Po Naing v. Burma Oil* (1929) A.C. 140.

(2) *Borys v. Canadian Pacific Rly.* (1953) A.C. 217.

(3) *Ambard v. Trinidad Asphalt* (1899) A.C. 594.

(4) *Blades v. Higgs* 11 H.L.C. 621.

(5) *In re Flick* (1947) U.S. Military Tribunal, Nuremberg.

(6) *In re Krupp* (1948) U.S. Military Tribunal, Nuremberg.

(7) *In re Krauch* (1948) U.S. Military Tribunal, Nuremberg.

(8) *Schiffahrt-Treuhand v. Procurator-General* (1953) A.C. 232.

(9) *Re Billotte* (1948) Netherlands District Court, Arnhem.

(10) *Re Hinrichsen* (1950), Court of Cassation, Hague.
(11) *Pigeat et Hazard v. Cie de Traction sur Les Voies Navigables* (1943) Dijon Court of Appeal.
(12) *Austrian Treasury v. Auer* (1947) Supreme Court, Austria.
(13) *In re Oatway* (1903) 2 Ch. 356.
(14) *Lupton v. White* (1808), 15 Ves 432.
(15) *The French State v. Lemarchand* (1948) Rouen Court of Appeal.
(16) *Rouyer Guillet & Co. v. Rouyer Guillet & Co. Ltd.* (1949) 1 All E.R. 244.
(17) *Anglo-Iranian Oil Co. v. Jaffrale (The Rose Mary)* (1953) 1 W.L.R. 246.
(18) *In re Esau* (1949) Netherlands L.R. No. 438.
(19) *Johansen v. Public Authorities* (1948) Appeal Case No. 15/1946A of the Holo-galand Lower Court of Appeal.

COURT OF APPEAL.

Sir Hartley Shawcross, Q.C. (*C. H. Withers-Payne* with him) for the appellants.

Geoffrey Cross, Q.C. (*G. S. Hill* with him) for the respondents.

The following cases were also cited in argument: *Werner v. Rothchild* (1953) 4 Journal du droit Internationale 875; *Republic of Italy v. Hambros Bank* (1950) 1 All E.R. 430; *West Rand Central Gold Mining v. R.* (1905) 2 K.B. 391; *Chung Chi Chung v. R.* (1939) A.C. 160; *Public Prosecutor v. N.* Annual Digest 1919/42 Supp. 162; *Govt. Land Distribution Board v. Pedersen* (1947) Judgment of Supreme Court of Denmark, Case No. 293/1947; *Mortier v. Lauret* (1947) A.D. 123; *Thiriez & Descamps* (1948) A.D. 205; *Delville v. Servais* (1943) A.D. 45; *The Rose Mary* (1953) 1 W.L.R. 246; *In re Fried Krupp* (1917) Ch. 188; *In re Jeewandas* I.L.R. 7 Bom. 109; *Sara Chunda v. Gopal Chunda* (1892), L.R. 19 I.A. 203; *Knights v. Wiffet* (1870), L.R. 5 Q.B. 660; *Dixon v. Kennaway* (1900) 1 Ch. 833; *Rotterdam Bank v. Institute* (1949) N.J. 566 & (1950) N.J. 492; *L. H. v. Collector of Taxes* (1949) N.J. 346 & (1950) N.J. 494; *B. H. v. Saltford* (1953) 1 Q.B. 248; *Rustomjee v. R.* (1876) 2 Q.B. 69; *Cartwright v. Cartwright* (1878) 26 W.R. 684; *Lazard v. Midland Bank* (1933) A.C. 289; *In re Duke of Wellington* (1947) Ch. 506; *U.S. v. Pink* (1942) 315 U.S. 203; *Porter v. Freudenberg* (1915) 1 K.B. 857; *Maltoni v. Companini* (1947) A.D. 210; *City of Parnu v. Parnu Loan Society* (1935) A.D. 231; *Robertson v. Ministry of Pensions* (1948) 2 All E.R. 767; *Fitzgerald v. Fairbank* (1897) 2 Ch. 96; *Mills v. Brooker* (1919) 1 K.B. 555; *Nichols v. Ely Sugar Beer* (1936) Ch. 353.

The facts and arguments appear sufficiently from the judgment below.

Cur. Adv. Vult.

Whyatt C.J. : — This is an appeal from a decision of the Board constituted under the Singapore Essential Regulations dismissing a claim by the appellants in respect of large quantities of petroleum which were seized as war booty by the armed forces of the Crown on the re-occupation of Singapore on the 5th September, 1945. The appellants contend that the petroleum was their property and not, as the respondents allege, the property of the Japanese State and in support of their contention, they rely upon two broad submissions, first, that they had a valid title to the petroleum under municipal law, and, secondly, that they were never lawfully deprived of their title by the Japanese belligerent occupant.

Before examining these submissions in detail, it will be convenient to set out the relevant facts which have been proved or admitted in the course of these lengthy proceedings. The appellants are three oil companies, incorporated in Holland, who prior to the outbreak of the war with Japan in 1941, carried on the business of producers and refiners of oil in Sumatra. Between them, they held all the concessions in Sumatra and owned two large refiners in the Palembang area in the southern part of the island. The total number of concessions was 86 of which 61 were held by the first appellant, 2 by the second appellant and 23 by the third appellant. The earliest concession was granted by the Netherlands Indies Government in 1907, and thereafter concessions were granted at various dates for periods ranging from 40 years to 75 years, the last concession being granted in 1941. By the end of 1941, the appellants had established production in 32 oil reservoirs, as they are technically known, situated in various places in the concession areas as shown on a map produced at the hearing of the appeal. These oil reservoirs are geological structures enclosing the crude oil in its natural state and it was agreed by the parties that the oil does not escape from them except by means of boreholes, or wells, drilled into the reservoirs from the surface. No detailed information was supplied as to the number of wells which had been drilled into the reservoirs by the appellants by the end of 1941 or as to the rate of production of the wells at that date but it may be inferred that production was on a substantial scale from the fact that the two refiners already referred to had a total capacity of 90,000 gallons per day. The position, therefore, at the outbreak of hostilities, was that the appellants were producing crude oil in commercial quantities from some 32 reservoirs under

concessions granted by the Netherlands Indies Government which still had substantial periods to run, and were refining crude oil obtained from these reservoirs on a large scale in their refineries at Palembang.

For the evidence of the events which occurred during the Japanese occupation, the parties were, of necessity, dependant upon the testimony of Japanese naval and military officers. The effect of this testimony, some of which was given orally, and some on affidavit, may be summarised as follows. When the Japanese armed forces occupied Sumatra, they immediately seized the appellants' installations in the field and also their refineries at Palembang because, as a Japanese naval officer, Admiral Watanabe, called by the respondents put it, "oil was the most vital war material at that time, and personally, I thought we started the war for the sake of the oil." The installations had been badly damaged as part of the Netherlands Indies Government's denial policy, and the Japanese military authorities organized a special technical unit under military discipline to repair them. By the end of the first year of the Japanese occupation, they were all in working order again and crude oil was once more being extracted from the reservoirs and being processed in the appellants' refineries. The Japanese military authorities did not bring any new oilfields into production but continued to extract oil from the existing reservoirs throughout the period of the occupation. The oil so extracted, or at least a substantial part of it, was shipped as refined products, and sometimes as crude, to Singapore where it was kept in storage tanks, belonging in some cases to the appellants' associated companies, until eventually it was forwarded to various destinations in Malaya, Thailand, French Indo-China and Japan proper to meet not only military demands but also civilian requirements in those areas. The Japanese colonel in charge of the Shipping Department of the Petroleum Office in Singapore throughout the occupation estimated that 6,000,000 kilo-litres, or approximately, 1,200,000,000 gallons, of petroleum from the Sumatra oilfields were distributed during the war in this way from the Singapore "relay storage point", as he called it, to military and civilian consumers in the southern theatre of war : he gave no estimate of the respective quantities allocated to military and civilian consumers. When the British landed in Singapore on the 5th September 1945, they found in the storage tanks approximately 55,000,000 gallons of refined petroleum and 11,000,000 gallons of crude oil, all of which, as is admitted by the respondents, had been extracted from the oil reservoirs in Sumatra by the armed forces of the belligerent occupant, and after refining at Palembang in the case of the refined products, had subsequently been shipped by them to the storage relay point in Singapore. The British military forces seized the petroleum stocks as war booty. Later, by an arrangement which the parties agree does not affect the issues in this case, the appellants were allowed to withdraw 20,000,000 gallons of refined and crude oil, leaving a balance of 46,000,000 gallons of refined products, which has been valued, by agreement between the parties, on the basis of 1941 Gulf prices at $5,099,490, which is the amount claimed by the appellants in these proceedings.

It is against this background of facts that I now turn to consider the numerous issues of law which have been raised in this case. As I have already indicated, they fall broadly under two heads, municipal law and international law; but it would be wrong to suppose that this division represents a true dichotomy, and indeed the complexity and multiplicity of the arguments in this case may well be due, in part at least, to a tendency to treat the issues as belonging rigidly to one or other of these branches of the law. The substantial contest in this case is between the appellants and the respondents' predecessors in title, the Japanese belligerent occupant, who is an International Person, and therefore it follows that when their competing claims are considered under municipal law, there is inevitably introduced an element of international law in view of the international status of one of the claimants. One further preliminary observation requires to be made on a matter which likewise has increased the complexity and difficulties of this case. Counsel for the appellants objected that at the hearing before the Board the respondents had relied on the Netherlands Indies law relating to *specificatio* without pleading it in their defence. Counsel for the respondents, while not conceding that there was any duty to plead *specificatio* specifically, contended that in any case the appellants had not been taken by surprise as translations of the relevant passages of Netherlands Indies law on this subject had been furnished to the appellants long before the trial. He also complained, by way of *tu quoque*, that the appellants, for their part, had raised matters of Netherlands Indies law without pleading them properly but he did not make any formal objection on this ground. It is true that the pleadings of both parties in regard to Netherlands Indies law were somewhat unsatisfactory, but after the lengthy hearings before the Board and before this Court, during which the numerous issues in this case have been fully and exhaustively canvassed by both sides, I do not think the shortcomings in the pleadings, such as they were, can be said to have caused substantial injustice to either party, and I, therefore, make no further reference to them in this judgment.

At the outset of their argument, the appellants recognized that it was incumbent upon them to show a good root of title under municipal law to the oil in the reservoirs in Sumatra prior to the Japanese invasion. It might be thought that an issue of this kind would not raise controversial questions of law but in the present instance this proved not to be the case for the respondents strenuously maintained that under the municipal law of the Netherlands Indies the oil in the reservoirs, far from belonging to the appellants, was a *res nullius* until it was seized *vi et armis* by the Japanese belligerent occupant. It, therefore, becomes necessary to examine in some detail the municipal law relating to the title to oil in Sumatra when it is existing in its natural state in reservoirs under the ground. The municipal law to be applied is, of course, the domestic law of the Netherlands Indies but since Netherlands Indies law is presumed to be the same as English law unless differences between the two are alleged and satisfactorily established, it will be useful, in the first place, to consider whether under the law of England oil *in situ* is a *res nullius*. It should perhaps be mentioned at this point that the *lex fori* in this case is the law of Singapore but as neither party has relied upon any distinction between the law of Singapore and the law of England in these proceedings, I propose to proceed upon the assumption that there are no material difference between the two systems affecting the present appeal.

In accordance with the maxim, *cujus est solum ejus est usque ad coelum et ad inferos,* the owner of land in England has, from the earliest times, been the owner, not only of the surface but of everything beneath the surface down to the centre of the earth, apart from percolating water which is not a subject of absolute ownership, and certain special exceptions such as treasure trove and gold and silver. The ownership of petroleum *in situ* was never the subject of any exception either at common law or under statute until 1934 when an Act of Parliament was passed which provided in section 1 that "property in petroleum existing in its natural condition in strata in Great Britain is hereby vested in His Majesty and His Majesty shall have the exclusive right of searching and boring for and getting such petroleum." It seems clear, therefore, that prior to 1934, petroleum *in situ* belonged to the surface owner under the ordinary common law principle and thereafter it became the property of the Crown by statute. The respondents sought to derive some support for the view that petroleum *in situ* is a *res nullius* from two decisions of the Privy Council, *U Po Naing v. Burma Oil*[1] and *Borys v. Canadian Pacific Railway*[2]. The *Burma Oil*[1] case contains *dicta* which suggest that the appellant in that case did not own the natural gas obtained from wells sunk for the purpose of extracting petroleum because natural gas *in situ,* like underground percolating water, was not a subject of ownership. Apparently the case of *Ambard v. Trinidad Asphalt*[3] was not cited but it should be observed that in that case Lord Macnaughten points out very clearly the fallacy of comparing minerals, even minerals of a fugacious character, with "water dropping from the clouds on the face of the earth and percolating the ground in no definite channel". It seems doubtful whether, in the light of present day petroleum technology as indicated, for example, in the *Borys*[2] case, the view that natural gas *in situ* is analogous to underground percolating water would still be followed: moreover since the decision in the *Burma Oil*[1] case, Parliament has recognised natural gas *in situ* as a subject of property by including it in the statutory definition of petroleum in the 1934 Act. In any case, the *Burma Oil*[1] decision merely relates to the ownership of natural gas *in situ* and does not touch the question of ownership of petroleum *in situ*. The second case relied upon by the respondents, in my opinion, provides even less support for the view that petroleum *in situ* is a *res nullius*. It is true that in the course of stating the opinion of the Board, Lord Porter refers to the diverse views held in different countries regarding ownership of fugacious elements such as gases, oils and water, but, in dealing with the particular matters for decision in that case, he states in terms that their Lordships agree with the conclusion of the Supreme Court of Alberta that "the petroleum reserved was the property of the respondents, and all gas not included in the reservation was the property of the appellant," which is clearly irreconcilable with the view that petroleum *in situ* or for that matter, natural gas *in situ* is a *res nullius*. So far, therefore, as English law is concerned, there is, in my view, no doubt whatever that petroleum in its natural condition in strata is not a *res nullius;* it has, throughout our legal history, been the subject of property; first, the property of the surface owner under common law, and latterly, the property of the Crown under statute law.

Turning now to the Netherlands Indies law on this subject, it is interesting, but perhaps not altogether surprising, to find that it has had a similar history to our English law. Originally the owner of land in the Netherlands Indies owned all minerals beneath the surface but later this position was altered by a statute known as the Netherlands Indies Mining Law (enacted in 1891, and amended in 1910, 1919, 1938, 1940 and 1941) which provided that the surface owner should no longer have the right to dispose of minerals,

(including petroleum) and that in future the Government, or persons authorised by the Government, should alone be entitled to develop them. The statute does not contain a "vesting clause", similar to the United Kingdom Act, vesting ownership of the minerals in the Government; but the appellants' experts on Netherlands Indies law, Dr. Nysingh and Dr. Funke, say this is to be implied from the fact that the Government is given power by the Mining Law, either to undertake development itself or to enter into agreements with third parties for such development. There appears to be nothing strained or difficult about such a construction but Dr. Veegens, the respondents' expert on Netherlands Indies law, took a different view, saying that the absence of a vesting clause meant that the minerals became a *res nullius* notwithstanding that hitherto they had always been the subject of ownership. Dr. Veegens supported his view with somewhat abstruse arguments from other sections dealing with the extraction of minerals, such as silver and zinc, when they are inextricably mixed *in situ* but it is significant that he could not give any other instance where under the law of the Netherlands Indies an immovable was regarded as a *res nullius*. It would appear, that Dr. Veegens was not very closely acquainted with the Mining Law of the Netherlands Indies, as he had always practised in Holland and he had not heard of, much less studied, a text book on Netherlands Indies Mining Law which was said to be a standard work on that subject. The appellants' expert, Dr. Funke, on the other hand, had practised many years in the Netherlands Indies and seems to have been familiar with the mining law of that country. I prefer, therefore, the evidence of the appellants' experts on this question of whether a mineral *in situ* became a *res nullius* for the first time upon the passing of the Netherlands Indies Mining Law. But even on the most favourable view of the respondents' evidence, it seems to me impossible to say that they have satisfactorily proved the differences which they allege exist between English and Netherlands Indies law on this point and therefore, I fall back on the presumption that the foreign law is the same as the English law, which means that I find that minerals (including petroleum) *in situ* in the Netherlands Indies are not a *res nullius*.

If minerals did not become a *res nullius* when the surface owners were divested of their title by the Mining Law, it follows in my view, that they became the property of the Government by virtue of section 520 of the Civil Code (which provides that immoveables which are unattended belong to the State) and of section 5a of the Mining Law which gives the Government the right to develop minerals; indeed it was not suggested they could become the property of any one except the Government if they were not a *res nullius*. The Mining Law, in addition to giving power to the Government to develop minerals itself, also authorises the Government to grant concessions for their development to third parties. In the present instance, the Government granted concessions to the appellants by a number of different instruments, all of which provide that the appellants shall have the exclusive right to explore and exploit the petroleum in the concession for a specified number of years. The respondents contended that the interest thus created in the appellants was analogous to the incorporeal hereditament of English law known as a profit a prendre and consequently the petroleum did not become the property of the appellants until it was actually reduced into possession by extraction. The appellants, on the other hand, contended that the interest created by the concession was more analogous to a lease of minerals for a term of years, giving them a right of property in the petroleum even while under the ground. It may be doubted whether analogies of this kind, based on legal concepts derived from feudal and even Anglo-Saxon times, are helpful to a British Court when considering the interpretation of a concession granted under the statute law of the Netherlands Indies, any more than analogies based on *emphyteusis* and *usufruct* would be helpful to a Netherlands Indies Court called upon to construe a grant made under the English Law of Property Act. Assuming, however, that some guidance can be obtained from English law on this matter, it is necessary to have clearly in mind the distinction between a lease and a profit a prendre. As is well-known, it is frequently a matter of difficulty for a Court to decide whether a particular instrument operates to create a lease or a profit a prendre. Each case must depend upon its own particular circumstances and the intention of the parties must be gathered from the instrument as a whole. If the Court is of the opinion that the intention of the parties is to confer a right of exclusive possession, unattended by a simultaneous right in any other person, the Court construes the instrument as a lease: but if, on the other hand, the instrument merely confers a right to use another's land for the purpose of taking a "profit" from it, the land itself remaining in the possession and control of the owner, then it will be regarded as a profit á prendre. Applying these principles, as nearly as may be, to the appellants' concession, it appears to me that the grant by the Government to the appellants was more analogous to a lease than to a profit a prendre since it gave the concessionaire an exclusive power to explore and exploit the petroleum existing in the strata in the concession area for a term of years and contained nothing whatever to suggest that any

other person could lawfully exercise any similar power in relation to the strata, least of all, could exercise a right of possession or control in relation to the strata, during the period of the concession, and indeed it was completely inconsistent with the exercise of any such power. The problem of comparing a concession with a lease or a profit a prendre was not, of course, put to the appellants' experts, Dr. Nysingh and Dr. Funke. or to the respondents' expert Dr. Veegens, as the analogy, being concerned only with English law, would not have been understood by them, but they were asked the specific question whether a concession gave any property in the oil to a concessionaire before extraction. The appellants' experts were quite definite on the point and stated that when a concession was granted, the property in the unextracted oil vested in the concessionaire; the respondents' expert, however, adhered to his view that the oil was a *res nullius*, unless and until it was reduced into possession by extraction and therefore a concessionaire could not have any property in it before extraction. The conflict between the experts on this point is irreconcilable but on this matter also, I prefer the evidence of Dr. Nysingh and Dr. Funke to that of Dr. Veegens.

The question of the precise nature of the legal interest created in the appellants by these concessions is, however, of less importance than it might otherwise be in view of the conclusion which I have reached as to when the appellants reduced the oil in the reservoirs into their possession. Possession in this sense is, of course, a question of fact, and, as Dr. Veegens remarked in his evidence, sometimes a difficult question of fact. But being a question of fact and not of law, it was not altogether appropriate that an expert in law should be asked to give his opinion on it. Nevertheless Dr. Veegens was questioned about this matter and gave it as his view that the oil was reduced into possession as soon as, but not before, it got into the "vertical pipe". In giving this opinion, Dr. Veegens was handicapped, as indeed the Board was also, by the circumstance that there was very little evidence at the hearing before the Board as to the position in regard to the operations of the appellants in the oilfields at the relevant dates. During the course of the hearing of the appeal, however, the evidence on this aspect of the case was supplemented by further facts which were agreed between the parties, and as a result, a somewhat clearer picture of the appellants' operations in the field is now available to the Court. As I have already said, the oil in question was trapped in a number of underground reservoirs from which it could not escape by natural means. The appellants had tapped these reservoirs by drilling a number of bore-holes or wells into them and by means of these wells, they were, at the outbreak of hostilities, extracting oil from them in substantial quantities in accordance with ordinary commercial practice. The question is whether in this state of facts the appellants can be said to have had possession of the oil in the reservoirs and this must in turn depend upon such further questions as the kind of physical control of which oil in a reservoir is practically capable, whether the appellants had physical control over the whole of the reservoirs, and whether they had sufficient control for practical purposes to prevent strangers interfering with the oil whilst it was still in the reservoirs. Unlike solid minerals, where control is acquired by sinking shafts and driving underground workings into the mineral deposits, control of oil in an underground reservoir is acquired by drilling wells — inserting "vertical pipes", as Dr. Veegens called them — into the reservoir from the surface. It was not suggested physical control could be exercised in any other way over the oil in an underground reservoir. The question whether the control is effective over the whole of the reservoir must depend, it seems to me, upon whether the number of wells is sufficient to enable the oil to be extracted from every part of the reservoir. In the present case, it appears to be reasonable to infer from the fact that the appellants were extracting oil from these reservoirs in substantial quantities in accordance with ordinary commercial practice, that they had drilled a sufficient number of wells to enable them to exercise effective control over all parts of the reservoirs. It is clear also from the evidence in this case that the appellants had sufficient control to exclude strangers from interfering with the reservoirs, subject to a few possible exceptions to which I will refer presently. In my opinion, therefore, the oil in the reservoirs was under the control of the appellants to the extent that it was capable of being under control and they were in fact dealing with it as fully and completely as any owner could deal with oil trapped in an underground reservoir. Accordingly I reach the conclusion that the appellants were in actual possession of the oil in the reservoirs at the time of the Japanese invasion. With regard to the possible exceptions, it was pointed out by counsel for the respondents that there were three or four reservoirs which, according to the map, appeared to be on or near the boundaries of the appellants' concessions and therefore, it was possible that they might extend beyond the appellants' concession areas under the adjoining land, in which event another concessionaire might, at some future date, drill wells into these reservoirs which are at present being exploited solely by the appellants. If this were to happen, some of the oil at present in the appellants' portion of the

reservoirs might flow into portions of the reservoirs underneath the new concession areas, replacing oil which the new concessionaire had extracted through his wells, as occurred, or at least as was envisaged, in the case of *Borys v. Canadian Pacific Railway*[2] (at page 220). However, until this actually happens, it seems to me that the correct view is that the appellants have possession of the oil in these reservoirs subject to the possibility that they may be divested of possession of some of it if a new concession is granted enabling the reservoirs to be tapped from the surface of the adjoining land. As this has not yet occurred, it does not affect my finding that at the outbreak of hostilities, the appellants had acquired possession of the oil in these reservoirs by drilling wells into them and extracting the contents on a commercial scale. In view of this findng, it matters not whether the interest created in the appellants by the concessions is to be regarded as analogous to a lease or to a profit á prendre; they had actual possession of the oil in the reservoirs and this, combined with the sole right to dispose of it, gave the appellants as complete a title to the oil as it was possible for any one to have during the period of the concession.

I now turn to consider whether the appellants were at any time lawfully deprived of their title by the Japanese belligerent occupant in accordance with international law but before doing so, it will be convenient to mention briefly two subsidiary arguments on the *res nullius* aspect of the case, in view of the possibility that this case may be considered by another Court. The respondents contended that under Netherlands Indies law a trespasser who wrongfully reduces a *res nullius* into possession, as, for example, a poacher who wrongfully kills game on another's land, becomes the owner of the *res*. In this, Netherlands Indies law differs from English law which, as is clearly laid down in *Blades v. Higgs*[4], provides that a *res nullius* reduced into possession by a trespasser becomes the property, not of the trespasser, but of the owner of the land. The respondents argued, therefore, that, on the assumption that the Japanese armed forces in extracting oil from the reservoirs were to be regarded as trespassers reducing a *res nullius* into possession, they would, under Netherlands Indies law, become the owners of the extracted oil. The short answer to this argument, in my view, is that an individual who commits a trespass when reducing a *res nullius* into possession is in a very different category from a belligerent occupant who does so. The former is subject to the restraints of the police and of municipal courts, whereas the latter is subject to no control at all and could, therefore, commit trespass continuously throughout the period of his occupation. The respondents maintained that this distinction was immaterial but in my view, it is very relevant in considering whether the municipal law of the Netherlands Indies relating to trespassers who reduce a *res nullius* into possession should be interpreted as being so benevolent as to include a belligerent occupant. I should require very cogent evidence to persuade me that "trespasser" in this context includes a belligerent occupant and as this was not forthcoming, I reject this alternative argument of the respondents.

The second subsidiary argument was an argument advanced by the appellants and was based on a Netherlands Indies Ordinance known as the Wartime Legal Relations Ordinance enacted in 1940. This Ordinance, which was said to resemble in some respects the English Trading with the Enemy legislation, provided that if any act was performed without the previous permission of a Committee acting under the Netherlands Indies' Director of Economic Affairs, which might directly or indirectly benefit the enemy, it would be void *ipso jure*. Therefore, according to this contention, the act of the belligerent occupant in reducing the *res nullius* into possession when he extracted the oil from the reservoirs (assuming it to be a *res nullius*, for the purpose of this argument) without first obtaining the permission of the Director of Economic Affairs' Committee, was void, *ipso jure*, and consequently no title was acquired by the belligerent occupant to the extracted oil. This argument illustrates the difficulty which arises if, as seemed to me to occur too frequently in the course of this case, international law is regarded as an entirely separate matter instead of being treated as an integral part of the law governing the issues in this appeal. The provisions of the Wartime Legal Relations Ordinance were, no doubt, very appropriate when applied to "persons", as defined in section 1 of the Ordinance, but to contend that they apply to a belligerent occupant, that is to say, to an International Person, who is thereby placed under a statutory obligation to seek the permission of the Director of Economic Affairs before doing any act which might benefit the enemy (which is, of course, himself) is to my mind, an untenable proposition.

I now proceed to consider whether the Japanese belligerent occupant had a right, under international law, to seize the crude oil in the ground and so deprive the appellants of their title to it. It was common ground that if such a right did exist in the belligerent occupant, it was derived from Article 53 of the Hague Regulations. Before, however, I examine this Article, it is necessary to consider a formidable submission advanced by the appellants which, if sound, renders a

detailed examination of the Hague Regulations academic. The appellants contended that Japan commenced the war, or at least launched an invasion against the Netherlands Indies, in order to secure the oil supplies of that country, because oil is an indispensable raw material in conditions of modern warfare. Therefore the Japanese invading armies, as soon as they had established the necessary military superiority, seized the appellants' installations, "lock, stock and barrel", and then proceeded, as speedily as possible, to repair and put them into operation, using for that purpose civilian technicians, called "Gunzokus", who were attached to the army and placed under service discipline. The whole operation, according to the appellants' argument, was prepared and executed by the Japanese military forces in accordance with Japan's Master Plan to exploit the oil resources of the Netherlands Indies in furtherance of their war of aggression. The plan was successful and enabled the Japanese forces in South East Asia in the course of the war to distribute vast quantities of oil, both crude and refined, to meet the needs of military and civilian consumers in the territories under their control and in Japan proper. This exploitation of the oil resources of the Netherlands Indies was, so the appellants contend, premeditated plunder of private property by the Japanese State on a totalitarian scale and as such, it was contrary to the laws and customs of war.

The appellants rely upon the evidence of Japanese naval and military officers to prove the facts upon which this submission is based. The Chief of the Fuel Section of the Supply Depot of the Ministry of the Navy in Tokyo stated that he was concerned in the spring of 1942 with plans for restoring the oil fields of the Netherlands Indies and later he toured the captured oil fields and arranged for personnel and material to be sent to repair them and put them into working order again. From October 1943 onwards he was stationed in Singapore which was then being used as a storage and forwarding point for naval and military fuel; some of it was crude oil which was forwarded to Japan to be refined, some of it was aviation spirit and diesel oil and was used by the army and navy in Singapore. Further details concerning the processing, refining and distribution of the oil were given by the Japanese military officers who were stationed at Palembang and at the Headquarters of the Petroleum Office in Singapore which clearly show that in addition to supplying military requirements, the oil was also used to meet civilian demands. In my view this evidence establishes that the seizure of the appellants' oil installations in Sumatra by the invading army was carried out as part of a larger plan prepared by the Japanese State to secure the oil resources of the Netherlands Indies, not merely for the purpose of meeting the requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad, during the course of the war against the Allied Powers.

These facts being proved, the next question to be determined is whether seizure of private property on such a scale and for such purposes was contrary to the laws and customs of war. On this point there is, fortunately, considerable authority available from decisions arising out of the war in Europe. First, there is the decision of the Nuremberg Tribunal, delivered in 1946, in which the principle is laid down that to exploit the resources of occupied territories in pursuance of a deliberate design to further the general war of the belligerent without consideration of the local economy, is plunder and therefore a violation of the laws and customs of war. This principle has been approved and further expounded in the cases of *In re Flick*[5], and *In re Krupp*[6], and *In re Krauch*[7], where it was applied to the acts of German industrialists who systematically plundered the economy of occupied territories by acquiring substantial or controlling interests in private property contrary to the wishes of the owners. The present case is much stronger as the plunder of the appellants' property was committed not by Japanese industrialists but by the Japanese armed forces themselves, systematically and ruthlessly, throughout the whole period of the occupation. In my opinion, these authorities fully support the appellants' submission. Accordingly I reach the conclusion that the seizure and subsequent exploitation by the Japanese armed forces of the oil resources of the appellants in Sumatra was in violation of the laws and customs of war and consequently did not operate to transfer the appellants' title to the belligerent occupant.

I now turn to the alternative argument urged by the appellants under this head, namely, that in any event the seizure was illegal as the crude oil in the ground was not "*munitions-de-guerre*" within the meaning of Article 53 of the Hague Regulations because it was then a raw material and moreover, an immoveable raw material. According to the British Manual of Military Law issued by the Army Council pursuant to the provisions of Article 1 of the Hague Regulations, "*munitions-de-guerre*" are such "things as are susceptible of direct military use". The respondents accept this interpretation of "*munitions-de-guerre*", as indeed they are bound to do since they are, in fact, the Crown although not appearing as the Crown *eo nomine* in these proceedings. Consequently they are compelled to argue that crude oil in the ground, although a raw

material, is susceptible of direct military use or at least has a sufficiently close connection with direct military use to bring it within Article 53. No direct authority was cited for the proposition that raw materials could be "*munitions-de-guerre*" but the respondents referred to a passage in *Oppenheim's* International Law (7th Edition) at page 404 where it is said that "all kinds of private moveable property which can serve as war material, such as ..... cloth for uniforms, leather for boots ..... may be seized ... for military purposes ..." which they contend supports the view that raw materials can be "*munitions-de-guerre*". On the other hand, *Professor Castren,* a Finnish Professor, in "Law of War and Neutrality", at page 236, says that "Raw materials and semi-manufactured products necessary for war can hardly be regarded as munition of war". It may be that certain types of raw material or semi-manufactured products, such as cloth for uniforms and leather for boots, which could possibly be made up into finished articles by army personnel without the assistance of civilian technicians and outside plant can, without stretching the meaning of "*munitions-de-guerre*" unduly, be regarded as having a sufficiently close connection with direct military use to bring them within Article 53. It is not, however, necessary to decide this point as the facts of this case show that there is no such close connection in the present instance. According to the evidence, elaborate installations and civilian technicians were needed by the army to enable them to appropriate this oil and prepare it for use in their war machines. It had to be extracted from underground reservoirs, then transported to a refinery, and then subjected to a complicated refining process before it was of any use to any one. In these circumstances, it cannot be said, in my opinion, that at the moment of its seizure in the ground, the oil had a sufficiently close connection with direct military use to bring it within the meaning of "*munitions-de-guerre*" in Article 53.

A further argument advanced by the appellants was that "*munitions-de-guerre*" does not include an immoveable and as the crude oil, when seized, was part of the realty, it was not a "*munitions-de-guerre*". The appellants conceded that certain things included in the categories specified in Article 53 which partake of the character of the realty, as for example, a railway transportation system, are seizable but they contended that these are exceptional cases and ordinarily Article 53 does not apply to immoveables. It was contended that oil in the ground could not be regarded as an exceptional case and in support of this view, reliance was placed on a *dictum* of Lord Simon in *Schiffahrt-Treuhand v. Procurator General*[8] (at page 262) to the effect that "it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting) .....". Lord Simon was not, of course, intending to give an exhaustive interpretation of "*munitions-de-guerre*" but, it would, I think, be a startling extension of his phrase "arms or ammunition which could be used against the enemy in fighting" to say that it could include minerals *in situ.* In my judgment, Article 53 was intended to apply, generally speaking, to moveables and only in those categories where the description is wide enough to include things which may belong, in part, to the realty, as, for example, "appliances for the transport of persons or things" mentioned at the beginning of the second paragraph of the Article, is it permissible to interpret it so as to include immoveables. "*Munitions-de-guerre*" is not, in my view, such a category. Accordingly I hold that crude oil in the ground, being an immoveable and not susceptible of direct military use, is not a "*munitions-de-guerre*" within th. meaning of Article 53.

The appellants, who were nothing if not prolific in preferring alternative arguments, contended that even if crude oil in the ground could be seized as "*munitions-de-guerre*" under Article 53, the seizure in this case was invalid because no receipt was given to the owners or any one representing them. Article 53 does not in terms require a receipt whereas Article 52 (which deals with requisitioning) expressly provides for one; consequently it might be said, as a matter of pure construction, that the omission in Article 53 was deliberate on the part of those who framed the Regulations and such a requirement ought not to be implied. This, however, is not the view taken by municipal courts which have construed this Article. In the case of *Billotte*[9] decided in 1948 by the Netherlands District Court at Arnhem, it was held that the failure of German military personnel to give a receipt when seizing a car rendered the seizure invalid. The Court of Cassation at the Hague took a similar view in *Hinrichsen's*[10] case in 1950. In that case a German Customs Frontier Guard seized two motor cycles without giving a receipt to the owner and the Court held that "this may not be done without in some way being officially acknowledged, in order to ensure compliance with the rule that such goods must be returned and compensation fixed when peace is made." In reaching their decision the Court of Cassation referred to the report of the proceedings at the First Hague Peace Conference (1899) in which it was stated that although it had not seemed opportune to make a special stipulation with regard to a receipt,

the Committee nevertheless were of the opinion that the fact of seizure should be clearly stated one way or another if only to furnish the owner with an opportunity to claim an indemnity. Furthermore, as the Court of Cassation pointed out, the British Manual of Military Law contains a statement to the same effect. The respondents sought to distinguish these authorities from the present case on the ground that a receipt or acknowledgment was not required when the seizure was otherwise notorious. No authority was cited in support of this view, but in any case it does not meet the case where, as here, the fact of seizure is notorious but the quantity seized is unknown. The appellants do not know and have no means of discovering how much crude oil was seized from their oil reservoirs during the Japanese occupation and even if everything else had been done according to law, it would not now be possible for them to claim the compensation expressly provided for in Article 53. It would have been quite a simple matter for the Japanese belligerent occupant to have given on official acknowledgment to the Custodian of Enemy Property who, so the Court was told, was appointed by the Japanese in Sumatra to represent absent owners, and to have furnished him with proper records of the crude oil they extracted; but nothing of the kind was done and the failure to do so, was, in my opinion, an infringement of Article 53 and renders the seizure invalid.

The last alternative argument advanced by the appellants on the construction of Article 53 was that even where the seizure is valid in all respects, the belligerent occupant obtains only a provisional title to the seized property and must restore it to the original private owner if it is still *in esse* at the cessation of hostilities. They contended that in the present instance the seized property was still *in esse* when hostilities ended and therefore the rights of the appellants revived and the property should have been restored to them. In support of this proposition, the appellants relied first, upon the express words of the Article which states that "seized articles must be restored ..... when peace is made", secondly upon the views of *Westlake* (War, Vol. II, page 115) and *Rolin* (Le Droit Moderne de la guerre paragraph 492), and lastly on two cases decided in municipal courts in 1943 and 1947 (*Pigeat et Hazard v. Cie de Traction sur Les Voies Navigables*[11]; *Austrian Treasury v. Auer*[12]). The respondents conceded that the provisions about restoration apply to some seizures and that if, for example, the seized article had been a motor lorry, the belligerent occupant would have been bound to restore it to the owner; but they contended that it would be contrary to common sense to apply these provisions to consumable war materials, such as petroleum, which are not readily identifiable as belonging to any particular owner. Such a distinction does not appear to be based on any principle but rather on the supposed difficulty of carrying out the provisions of the Article in practice. But if, in fact, there is no practical difficulty in identifying the owner of the property, as was the position in this case, I can see no justification for departing from the plain words of Article 53. The respondents further objected that if there was a duty to restore these petroleum stocks, it did not arise until peace was actually made. It is obvious, however, that the right of the belligerent occupant to use "*munitions-de-guerre*" must cease with the cessation of hostilities, and it appears to me that when this occurs, the only right then remaining in the belligerent occupant is a right to retain possession of the property on behalf of the owner, all other rights in the property revesting in the original owner. Accordingly I am of the opinion that, on any view of the matter, the appellants were entitled to require the belligerent occupant to hold these surplus petroleum stocks on their behalf until such time as they could be restored in accordance with the provisions of Article 53.

I have now dealt with the many contentions put forward by the appellants in respect of the Hague Regulations. At the outset of his argument, counsel for the appellants claimed that in seizing this crude oil, the Japanese military forces had contravened the rules of international law in every single particular. It was a sweeping claim but I am bound to say that I think he has made it good the seizure of the oil resources of the Netherlands Indies was economic plunder, the crude oil in the ground was not a "*munitions-de-guerre*", the failure to give a receipt was a fatal omission and the duty to restore the unconsumed petroleum was not fulfilled. In all these matters, the belligerent occupant, in my judgment, contravened the laws and customs of war and consequently failed either to acquire a valid title for himself or to deprive the appellants of the title which I have found existed in them prior to the seizure.

Before I leave the subject of the Hague Regulations I will refer briefly to the appellants' contention that in a war of aggression, such as this was, the aggressor state cannot in any circumstances acquire any legal title under the Regulations. This question was not very fully argued as counsel for the appellants asked that the appeal should be decided on narrower grounds although he naturally asked for the point to be kept open. Certainly this contention raises grave issues, reaching and extending far beyond the present case, touching indeed the springs of international law. The compelling logic of those who assert that all legal rights should be refused to an aggressor is opposed by

persuasive reasoning of those who maintain that such rules of war as are accepted by States should continue to prevail, notwithstanding the illegality of the war. Learned jurists differ profoundly on this matter and municipal courts have yet to give a decisive answer. In this state of uncertainty of the law, it is not, I think, desirable to express views on a matter which is not necessary for the decision in this case, and accordingly I do not pass upon it.

Before dealing with the last major issue in this case, namely, the issue of *specificatio,* I would mention an argument which was strongly relied upon by the appellants at one stage of the proceedings but later receded somewhat in importance. In 1943, a number of the Allied Governments, including the United Kingdom and the Netherlands Governments, made a formal Declaration that they reserved the right to declare invalid any dealings with property in occupied territories, and in a covering statement, stated they were mutually pledged to examine and if necessary, implement the invalidation of such dealings when they extended across national frontiers. The appellants contended that this Declaration was, in effect, a treaty and although it did not affect the rights of individuals in the absence of legislation, it did, nevertheless, mitigate the Crown's belligerent rights by excluding from the category of enemy public property liable to seizure as war booty, any property which had been plundered from private owners by the Japanese armed forces in the first instance. The respondents challenged this argument at every step, contending that the Declaration did not amount to a treaty, and that in any case it did not detract from the rights of armed forces of the Crown to seize war booty. They added that even if the Crown's seizure was invalid for the reasons urged by the appellants, this could not confer any title on the appellants, and therefore the contention based on the Inter-Allied Declaration was irrelevant to any issue which the Court had to determine in this case. The logic of this reasoning appears to me convincing and accordingly I reject the appellants' argument on this point.

Finally I turn to the issue of *specificatio* upon which the respondents succeeded before the Board and which assumed great prominence in the arguments presented by the respondents to this Court. Stated in its simplest terms, the issue of *specificatio* is no more than this: if the Japanese armed forces did not deprive the appellants of their title when they seized the crude oil and shipped it to Singapore, does it make any difference that in some instances (of which the present is one), they refined it before shipment. The respondents strenuously maintained that it made a fundamental difference because, according to their contention, the action of the belligerent occupant in refining crude oil extinguished the appellants' title and vested the ownership of the refined product in the belligerent occupant; or, to put the matter another way, the belligerent occupant, by refining the crude oil, purged himself of his offences against the Hague Regulations and by virtue of this process created a new title in himself which was untainted by the original illegality and, therefore, valid against the appellants. They relied in support of this proposition, not upon the laws of war but upon an ancient doctrine of municipal law, derived from Roman Law, and known in the Netherlands Indies as "*specificatio*". This doctrine was embodied in the Netherlands Indies Civil Code in 1830 and is contained in Article 606 which reads as follows: — "He who makes of a material not belonging to him a thing of a new sort becomes the owner of such thing provided he pays the price of the material ....". The belligerent occupant, so the argument runs, made a thing of a new sort when he refined the crude oil, and therefore became the owner.

Before examining the evidence on this matter given by the experts on Netherlands Indies law, it will be convenient to consider the English law applicable to this subject, since, if the Netherlands Indies law is not satisfactorily proved, it will be necessary, as in the case of the law relating to *res nullius* referred to earlier in his judgment, to fall back on the presumption that it is the same as English law. The relevant principle of English law is expressed with simplicity and clarity in *In re Oatway*[13] (at page 359) where Joyce J. states: "It is a principle settled as far back as the time of the *Year Books* that, whatever alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material: *Blackstone,* Vol. ii, page 405, and *Lupton v. White*[14] (1808) 15 Ves. 432." The same principle is approved in *Salmond* on Torts, 11th Edition at page 355: "If my corn is wrongfully taken from me and made into flour, the flour is mine, and if my tree is cut down and sawn into timber, the timber is mine." It seems clear, therefore, that under English law, ownership in crude oil would not be extinguished by the process of refining, whether it is done by a private person or by a belligerent occupant.

It is against this background of English law that I now turn to consider the Netherlands Indies law on this matter. The experts on both sides were in substantial agreement that under Article 606 of the Civil Code, a private individual who refined crude oil belonging to someone else would become the owner of the refined product, but when they came to consider whether the same would hold good if a belligerent

occupant refined crude oil which he had unlawfully seized in violation of the Hague Regulations, they were in strong disagreement. The respondents contended that a belligerent occupant could acquire title to private property under municipal law in the same way as any private individual and referred to the practice of military commanders in occupied territory obtaining supplies by purchase under the ordinary law. The respondents also cited the case of *The French State v. Lemarchand*[15] where, it was contended, the Court had, by implication, approved a belligerent occupant acquiring property under the local law by means of *accessio*, which, it was said, was similar in principle to a belligerent occupant acquiring title by *specificatio* under the local law. I very much doubt whether *Lemarchand's*[15] case will bear the interpretation which the respondents seek to place upon it but in any event, it is not necessary in my view to consider exhaustively all the ways by which a belligerent occupant might acquire title to private property under municipal law independently of the Hague Regulations, as the only point for decision in this case is whether the method of *specificatio* was available to the Japanese armed forces after they had seized the crude oil belonging to the appellants contrary to the provisions of the Hague Regulations. The answer to this question turns upon the construction of Article 606 of the Civil Code read together with the Hague Regulations, in particular, Articles 46 and 53 of those Regulations, which form part of the statute law of the Netherlands Indies, having been enacted as a statute in 1910. Oddly enough, the appellants' experts, Dr. Nysingh and Dr. Funke, were not specifically questioned on this point of construction, but the respondents' expert, Dr. Veegens, when asked about it, said that in his opinion the Japanese belligerent occupant could obtain a title by *specificatio* because a belligerent occupant has the same rights as any one else in the territory. Dr. Veegens fortified his opinion by reference to an official explanatory memorandum issued in 1947 to accompany the Rehabilitation of Rights Ordinance 1947 which states that where a Japanese body has administered a business during the occupation for itself, any products made by the business from raw materials belonging to another, would become the property of the Japanese body by *specificatio*. It should be observed that this memorandum does not refer to the Japanese belligerent occupant as such, but to "Japanese or Japanized bodies" which ran businesses in the Netherlands Indies as going concerns during occupation, but, subject to this comment, the memorandum gives some support to Dr. Veegens' view that a belligerent occupant could acquire property by *specificatio* in the occupied territory. The appellants' experts however, profoundly disagreed with this view and went so far as to say that the memorandum could not have been drawn up by good jurists. Moreover they were not content merely to deny the correctness of the memorandum but, so to speak, counter-attacked by alleging that the doctrine of *specificatio* could not, in any circumstances, be applied to an enterprise, or, as Dr. Funke called it, a *universitas rerum*, like the appellants' installations in Sumatra. In other words they said that if a person makes a new thing from material belonging to another by means of the "enterprise" of that other person, the finished product does not, in such a case, become his property because *specificatio* does not apply to the operations of an enterprise. Dr. Veegens disagreed with this view just as emphatically as Dr. Nysingh and Dr. Funke disagreed with his interpretation of the memorandum on the Rehabilitation of Rights Ordinance. He stated quite categorically that the doctrine of a *universitas rerum* had nothing to do with the doctrine of *specificatio*. A further argument advanced by Dr. Nysingh and Dr. Funke was that *specificatio* was "an act" prohibited by the Wartime Legal Relations Ordinance and therefore void *ipso jure*, but Dr. Veegens would have none of this, saying that only an "act-in-the-law", that is to say, an act which is a manifestation of the will directly aimed at producing a legal effect, was prohibited by this section of the Ordinance. There was, unfortunately, practically no common ground between the experts on any of these topics, many of which involved legal concepts unfamiliar to an English lawyer. In these circumstances, it seems to me appropriate to recall the words of Lord Greene in *Rouyer Guillet & Co. v. Rouyer Guillet & Co. Ltd.*[16] when speaking of the contruction of foreign statutes : "When you come to the statute law itself", he said, "although it is right that ***prima facie*** what must be considered is the evidence of the experts and not the text of the law, when the experts differ as to its meaning an English court is entitled and if it is to perform its function properly, is indeed, bound, to apply its own mind, fortified by the opinion of the witnesses and giving what weight it thinks ought to be given to it, to the text itself and to examine it in order to make up its mind on the question of interpretation as between the two sets of witnesses".

Accordingly I now proceed to examine the text of Article 606 of the Civil Code and the relevant Articles of the Hague Regulations, in the light of the principle laid down by Lord Greene in that case. Article 606 begins with the pronoun "he" and therefore before a belligerent occupant can come within the scope of this Article, the word "he" must be construed so as to include not only a private person, but also an International Person, namely, a belligerent occupant. It is,

to my mind, unlikely that the Netherlands Indies' legislature when they enacted this Article of the Civil Code in 1830, intended it to apply to a belligerent occupant who, normally, is quite independent of the laws and the courts of the occupied territory. Dr. Nysingh apparently shared this view because he stated, in his somewhat faltering English: "Article 606 is not meant, does not apply, to cases like this when it came into existence during the occupation of this country" But the other expert witnesses apparently did not address their minds specifically to this point. The further question to be considered is whether in any event the rest of Article 606 can be reconciled with the Hague Regulations, particularly Article 46, which states that private property must be respected, and Article 53 which prescribes the methods by which private property may be lawfully seized. If it cannot be reconciled, then all the experts agree that the Hague Regulations must prevail. It is clear that Article 606 postulates that the person acquiring title to property by *specificatio* is a person having no lawful title to the raw material from which the new thing is made. Therefore a belligerent occupant seeking to acquire title under Article 606, must, *ex hypothesi,* have acquired the raw material unlawfully and this, in the case of a belligerent occupant, necessarily means inconsistently with the Hague Regulations. Consequently a belligerent occupant cannot bring himself within both the Hague Regulations and the provisions of Article 606. The two are irreconcilable and since the Hague Regulations prevail, it follows a belligerent occupant cannot avail himself of Article 606. But if this construction is not correct, the matter is, in my view, at best left in doubt and therefore a presumption arises in favour of English law, which, as I have already explained, preserves the title of the true owner if he can prove the identity of the original materials. Accordingly in my judgment the plea of *specificatio* fails.

The further question whether a British court would apply the Netherlands Indies' law if it gave a title by *specificatio* to a belligerent occupant in circumstances such as occurred in this case, does not, therefore, arise, but if it were necessary to consider the point, I should be prepared to hold that it was contrary to public policy for a British court to recognize a foreign law which confers validity on illegal acts committed by a belligerent occupant in violation of the Hague Regulations.

I would only add that it would indeed be strange, if after committing a breach of the Hague Regulations, the belligerent occupant could invoke the municipal law of the hostile state, not only to avoid the consequences of his delinquency but also to give him a good title against the world. The conclusion I have reached avoids this ironical result and harmonizes with the maxim *"Ex injuria jus non oritur"* which, as Professor Lauterpacht has said, expresses a principle of particular importance in the international sphere where sanctions cannot easily be applied against wrongdoers.

For these reasons I am of the opinion that the appeal should be allowed. The appellants should have the costs of the appeal and of the proceedings before the Board.

Mathew (F.M.) C.J. : — The claimants-appellants were the sole concessionaires of all oil concessions in Sumatra at the time that Sumatra was invaded by the Japanese military forces in the early part of 1942 The various installations were, as far as possible, put out of action before the Japanese arrived, but with the aid of certain oil experts working under the Japanese naval and military forces, the oil installations were repaired and oil production resumed. The whole output was used for Japanese requirements in the various theatres of war and in Japan. It is clear from the evidence of Admiral Watanabe that the seizure of the oil fields was planned before the Japanese invasion of the Netherlands East Indies, and that the purpose of the invasion was to secure oil supplies which Japan lacked. Such evidence as there is shows that the seizure of the oil fields was based not on any legal rights which might have been available to a belligerent occupant under the Hague Regulations, but on the basis that "might is right", a concept unknown in any civilised legal system.

The various refined products, the subject of the claim, which were seized by the British military forces on the re-occupation of Singapore in September 1945, were processed from the crude oil from the claimants' oil fields, which fact is not in dispute. I think it convenient here to say that in my view the seizure of the oil fields and installations, which were private property, was in clear violation of the Hague Regulations. The oil fields and installations were seized and operated by the armed forces of Japan, and there is no attempt or, indeed, any intention to deal with them as enemy property through a Custodian. The refined products with which we are concerned are the fruits of illegal extraction and processing. It required an illegal seizure of the claimants' private property before the crude oil *in situ* could be obtained.

It is not contended by the Crown that the seizure of the crude oil can be justified by any article other than article LIII (2) of the Hague Regulations, which reads :—

"All appliances, whether on land, at sea, or in the air, adapted for the transmission of news or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally,

all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

The effective words are: "all kinds of ammunition of war". Can crude oil be brought within the ambit of this definition, even if "*munitions-de-guerre*" is translated as "war materials"?. It is, I think, made clear in the Official Manual of Military Law, Chapter XIV sections 415 and 416, which were issued by His Majesty's Government in implementation of article 1 of the Regulations, that only materials can be seized which are susceptible of immediate and direct use. I am unfamiliar with the processes to which crude oil is subjected before it becomes a refined product, but it is apparent from the evidence of Captain Murphy that it requires a number of different processes to change crude oil into refined products. I find it impossible to compare crude oil, secreted in the bowels of the earth which requires high scientific knowledge and skill to extract and still more to process into usable products, with cloth and leather which require no more than a number of stitches to make coverings for the body or the body or the feet and which though perhaps lacking in pleasing design are none the less utilitarian and are adequate for virtually immediate military use.

The whole purpose of section III of the Hague Regulations articles XLII-LVI is to restrict the rights of a belligerent occupant in respect of private rights and private property. Article XLVI reads:—

"Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."

It is clear in its terms and, in my view, the seizure of the oil fields and installations was in flagrant violation of the Hague Regulations. The seizure of the crude oil on extraction was also in contravention of the Regulations and, so far as this aspect of the case is concerned, the Japanese must be regarded as having seized the oil without any claim of right and therefore failed to acquire a valid title in the oil seized which, as I shall deal with later, was always in the claimants. I cannot agree that in construing the Hague Regulations regard should be had to the fact that war has now become total, for this would have the effect of virtually removing all protection from private property and leaving private owners at the mercy of invading armies. As has been said in *re Krauch & Ors.*[7], (I. G. Farben Trial), United States Military Tribunal at Nuremberg, 29th July 1948, reported in the Annual Digest of Public International Law Cases for the year 1948, p. 668, at p. 677:—

"It must be admitted that there exist many areas of grave uncertainty concerning the laws and customs of war, but these uncertainties have little application to the basic principles relating to the law of belligerent occupation set forth in the Hague Regulations . . . . . We cannot read obliterating uncertainty into these provisions and phrases of international law having to do with the conduct of the military occupant toward inhabitants of occupied territory in time of war, regardless of how difficult may be the legal questions of interpretation and application to particular facts."

In my view, the Japanese acted in contravention of the Hague Regulations, and committed an act of pillage against the claimants' properties, which rendered them liable to be condemned for a violation of the laws and customs of war. The various decisions of the Military Tribunals set up at Nuremberg after the war leave this point in no doubt.

The case for the claimants shortly is that they were the only people entitled under the law of the Netherlands East Indies to extract the crude oil beneath these concessions, that the refined products which were seized in Singapore originated in these concessions, that the claimants were always the owners of the oil products, that the Japanese never acquired a title to those products under International Law or Municipal Law, and that even if they could acquire a title under Municipal Law, the operation of Municipal Law would be inconsistent with the established principles of International Law and could not be given effect to by the Courts.

The Crown has denied that the claimants had any title to the refined products and have positively set up the defence, that the title to the products seized was in the Japanese. One of the submissions is that unextracted minerals under the Netherlands East Indies law are *res nullius*, and only become the subject of property when the *res nullius* is reduced into possession. Minerals being a *res nullius* the crude oil became the property of the Japanese when they extracted it.

Of the three expert witnesses on Dutch Law, Dr. Veegens is the only protagonist of the school that regards unextracted minerals as *res nullius*. Under section 517 of the Netherlands Indies Civil Code of 1847 (which reads as follows):—

"1. The property in land implies the property in everything being on and in the soil.
2. The owner is free to plant and build on his land whatever he likes with the exceptions made in the fourth and sixth titles of this Chapter — (Rights and duties between neighbours etc. not relevant).
3. He is free to build and dig below the surface and to get all benefit thereof with the exceptions resulting from the laws and ordinances on the subject of mining, digging for peat and other similar matters"

the surface-owner had ownership of minerals subject to the mining laws. In 1899 the Mining Law laid down (section 1) that:—

"In the Netherlands Indies the owners of rights over the ground may not dispose of the following minerals."

of which oil is one specified. This, in Dr. Veegens' view, had the effect of taking away the property in the

minerals from the surface-owner. The giving of a right to dispose of those minerals to a concessionaire, did not give the rights of an owner to a concessionaire. He insisted that the Mining Law was a comprehensive code dealing with the prospecting for and the development of minerals, and had nothing to do with ownership. That the Dutch legislators were at pains to avoid the question of ownership is clear from the explanatory memorandum (Ex. 58):—

"Ad primum. In the first place the draft bill fulfils the requirements of a good mining law to set out clearly and unambiguously its fundamental principles. The most important of these is that in the Netherlands Indies the owner of rights over the ground is not entitled to dispose of the minerals referred to in the law. What legal character should be attributed to these minerals, whether before discovery they must be considered as *res nullius*, as a right of the Crown or as part of the soil, is wholly irrelevant for the purposes of the maker of a practical mining law."

In the Memorandum of Reply it is said:—

"And what advantage would the discoverer, the concessionaire, derive from a determination of their legal character, if he is guaranteed the right of free disposal of the minerals in question?"

When Dr. Veegens was asked for his opinion of what the mover of the Bill said:—

"There are those who assert that the minerals are "*res nullius*" — a view with which the Government greatly sympathises, with the proviso that they are not "*res nullius*" in the sense ordinarily attached to that expression, for whereas in normal usage it is assumed that occupation gives rights to the "*res nullius*", here it is the concession",

he replied rather lamely that it was a slip and did not agree with the other memoranda. I would feel rather that the mover was making a necessary point, namely, that as the right to dispose of minerals had been removed from the surface-owner, there would be those who would say that unextracted minerals from thenceforward would be *res nullius*. It was really an academic point and could have no relevance, for what does it matter, as "the discoverer, the concessionaire . . is guaranteed the right of free disposal of the minerals in question"? Does not this point to an intention to vest at least the effective rights of ownership in the concessionaire on extraction? But Dr. Veegens will not admit that any title in the concessionaire to extracted minerals flows from the Mining Law. The title to the extracted minerals flows, according to him, from article 585 of the Netherlands Indies Code which reads:—

"Moveable things not belonging to anybody, the title is acquired by the first occupant."

Oil, though an immoveable, becomes a moveable on extraction. Article 520 (which reads):—

"Land and other immovables which are unattended and have no owner, and the things of persons who die without heirs or whose estates have been abandoned, belong to the State"

does not vest ownership in the State, because the Mining Law was enacted subsequently to the Civil Code. The right to dispose is only one of the attributes of ownership. I regret that Dr. Veegens was not asked about the *jus utendi fruendi abutendi* of Roman Law or article 544 of the French Civil Code (on which the Dutch Civil Code is based),

"La propriété est le droit de jouir et disposer des choses de la maniére la plus absolue pour vu qu'on n'en fasse un usage prohibé par les lois ou par les regléments"

with a view to his explaining how the removal from the surface-owner of one attribute of ownership in minerals beneath his land rendered the minerals in question a *res nullius*. Were a law enacted prohibiting owners from disposing of old master paintings, the owner's right of disposing of his Rembrandt would have been taken away, but he would still have the right to enjoy it. It may be that the other rights of the surface-owner in minerals beneath the surface would be in the nature of a mere *nudum jus*, but he would still have dominium of a limited kind.

It is impossible to accept Dr. Veegens' theory of unextracted minerals being *res nullius*, because the essential characteristics of a *res nullius* is that anybody can lawfully acquire it by occupation. In a concession field only the concessionaire can extract and dispose of minerals.

The purpose of the Mining Law with its subsidiary legislation, the Mining Ordinance, was to ensure the orderly development of the mineral resources of the Netherlands East Indies. It effected this by removing from the surface-owner the right to dispose of minerals and by giving to the Government an absolute right to restrict prospecting to licensed prospectors and to restrict the extraction and disposal of minerals to selected concessionaires, or the Government itself to undertake prospecting and development.

Dr. Funke's views are the more logical. Minerals are immoveable property and, therefore, under article 520, are the property of the State. When a concession is granted or a 5A agreement is made, the minerals become the property of the concessionaire (under section 16) on a grant or under section 5A on the conclusion of an agreement. Sub-section 1 of section 5A (1910 amendment) gives the right to the Government to prospect and develop areas not already conceded to others. Since 1919 oil can only be developed under a 5A agreement. As regards extracted oil, Dr. Funke says that it cannot be the surface-owner's, as his right to dispose has been removed by section 1 of the Mining Law; the Government cannot be the owner because under section 5A Government may not come into conflict with concessionaires. *A fortiori* an unauthorised party cannot dispose. Oil extracted from a concession must belong to the concessionaire. On a

proper construction of the Mining Law I do not see how any other opinion can be given.

In my view, the *res nullius* theory does not stand up to critical examination, and I would agree with the minority view of the Board that unextracted minerals are not *res nullius*. In my view, further, the claimants had the exclusive right to extract and exploit, and that property in the unextracted oil was in them. Even if I am wrong, the claimants had property in the oil on extraction. How could it be otherwise under a law which guaranteed the concessionaire the right of free disposal of the minerals? The concessionaire was given an attribute of ownership which so far as the Mining Law was concerned was effective ownership.

The next question which requires consideration is that posed by Mr. Cross, in his summary of argument :—

"Whether if the claimants had a title to the extracted crude oil that title survived the transformation of the crude oil into petrol by the Japanese."

I do not think it is in dispute that the refined products, the subject of this claim, are new things made from crude oil. The question to be answered is — does section 606 of the Civil Code of the Netherlands apply in this case? We are not helped on the construction of this section by decisions of the Dutch Courts there having been but one since the Civil Code was enacted in 1847, and that in 1875. We have only for assistance the evidence of the Dutch legal experts. The Board treated with scant justice Dr. Funke's views on this subject. He stated that oil wells, oil installations and oil plants fell under the principle of *universitas rerum*. He explained that where there is an enterprise, a business, a factory, they are regarded under Dutch Law as an entity and all things in it are part of that enterprise. He illustrated the point by giving an example. If bandits take over a factory and run it and are thereafter thrown out, they cannot claim title to the goods they have made during their illegal tenure of the factory, for the goods produced are part of the concern. So he points out that the making of crude oil into refined products does not change the title, for the refined products are part of the enterprise. By way of explanation, he produced part of the new Civil Code being prepared by Professor Meijers together with an explanatory memorandum on the proposed new article. The Board appeared to think that he was giving an opinion based on a law that had never been enacted. His intention was to illustrate that this was no new principle in Dutch Law. Professor Meijers, in his Commentary, says :—

"The universality remains the same even though a change takes place in its constituent parts. Herein lies embodied the rule of 'Zaaksvervanging' (substitution of things) subrogation reelle — a rule which has been handed down to us from ancient times primarily for the universality of goods and to which *inter alia* sections 214, 542, 1032 etc. bear witness."

The Board did not appreciate that Professor Meijers was merely incorporating in a new draft a principle which had been accepted for many years. The sections of the Code which he referred to clearly indicated the existence of the principle he was enunciating. He points out with force that if section 606 which reads :—

"He who makes of a material not belonging to him a thing of a new sort becomes the owner of such thing, provided he pays the price of the material and, if there are grounds for so doing, makes good the costs, damages and interests"

is to be applied to every making of a new thing, then the employee of a firm becomes the owner when he manufactures a new thing out of raw products, the property of his employer. In my view, Dr. Funke's interpretation of the Mining Law carries out the intention of the legislature and gives the concessionaire, to the exclusion of all others, the right to extract and the right to dispose of minerals found within their concession areas, whereas Dr. Veegens, with elaborate argument has advanced a theory which defeats the whole intention of the Mining Law and gives rights of property in minerals to those who were never intended to come within the scope of the Mining Law. If he is right, his process of ratiocination has forced him to discard the maxim "*ex injuria jus non oritur*". Dr. Veegens will not agree that article 520 of the Civil Code gives property to the State in unextracted minerals, yet calls in aid section 606 of the Civil Code for the purpose of giving a title to a belligerent occupant, who acted with a total disregard for the Hague Regulations, which are part of the Netherlands Municipal Law.

In the summary of his argument Mr. Cross submitted, in my view correctly, that there were four questions :—

"(a) Whether the claimants owned the crude oil from which the petroleum products were refined before it was extracted from the earth;
(b) whether (if not) the claimants obtained a title to it on its extraction by the Japanese;
(c) whether, if the claimants had a title to the extracted crude oil, that title survived the transformation of the crude oil into petrol by the Japanese; and
(d) whether (in any event) the Japanese were entitled under the Hague Regulations to seize the crude oil."

which were not separate issues in the case, but a series of hurdles, each of which had to be successfully surmounted by the claimants before they could establish their case.

In my view, the appellants have succeeded on all points. The *res nullius* theory of Dr. Veegens cannot be supported unless, as I have already said, a construction is to be placed on the Mining Law, which defeats the true purpose of the law. But for the

invasion of the Netherlands East Indies by the Japanese it would have remained a nice point to be discussed by Dutch lawyers in their leisure moments. It is now a point for decision. We have been invited to draw analogies between fish, game, wild animals, water percolating through undefined channels and gas, and crude oil *in situ*. In my view, the analogies are not sound. In this case the crude oil was in natural reservoirs, incapable of passing outside the boundaries of the reservoirs. Its extraction was made possible by the sinking of wells. Under the Mining Law the claimants, to the exclusion of all others, had been given the right to extract and dispose of the oil. When the Japanese forces arrived in the Netherlands East Indies, the claimants had long since sunk oil wells and installed the necessary machinery to extract crude oil and refine it when drawn to the surface. They were in a position to extract and market all the oil in their respective areas for a period of years, and the quantity to be extracted was governed by purely economic considerations. It is immaterial to my mind that the extraction of all oil under the surface may not be complete when the concession comes to an end and the oil fields revert to the Government for disposal. I find it impossible to compare crude oil in natural reservoirs, the subject of an exclusive concession, with a fish in the sea or a deer in the forest or a fowl in the air, which becomes the property of the first person who captures it. These are true *res nullius*. But the oil in the claimants' reservoirs with the wells they have sunk would seem to me to be more analogous with a natural tank of water in a mountain into which the person who is granted it inserts a pipe and tap which he turns on or off at will. To protect his rights he locks the tap when he is away. The destroying of the installations before the arrival of the Japanese is analogous to locking up the water tank.

Even accepting that unextracted minerals are *res nullius*, the claimants had, in my view, reduced the crude oil into possession before the arrival of the Japanese military forces. They had sunk wells into the oil reservoirs and had installed machinery which was bringing the crude oil to the surface. I find it difficult to conceive a more complete reduction into effective possession.

The right of disposal is taken away from the surface-owner by the Mining Law, but a *residuum* of ownership rights would seem to remain and, indeed, provision is made under section 99(1) of the Mining Law for the owner of the surface rights to obtain full ownership of oil which he unwittingly taps when legally constructing works on his land which has not been conceded. If there were a concession, he would have to hand over to the concessionaire. The whole object of the Mining Law is to ensure that minerals when extracted go to the concessionaire and to no one else. The silver concessionaire who extracts zinc hands it over to the zinc concessionaire, if he wants it, on payment of extraction costs. Whether minerals underground are a *res nullius*, which I am unable to hold, the minerals on extraction are the property of the concessionaire and of no one else. In my view, the concessionaires had an absolute right during the currency of their concessions to the crude oil which came from their concession areas, this right continued through the processing period and the refined products could only be the property of the claimants. The obsolete doctrine of *specificatio*, when used to protect an honest labourer, is reasonable; but to apply it to protect the activities of thieves who continued their depredations without interruption for more than three years cannot be supported in reason or on a proper construction of the Netherlands Indies Law. The claimants had certain rights of property in the oil, which could not be destroyed. They had rights *in rem* in respect of the oil in their concession areas, and had the right to mortgage (under section 18 of the Mining Law) their concession rights. The concessions (I use the expression to cover all rights of exploitation conferred under the Mining Law) gave them rights *in rem*.

As I have already said, Dr. Funke's expert evidence on the Mining and Municipal Laws should have been accepted by the Board and, indeed, he was not only a distinguished lawyer but had also practised in the Netherlands East Indies for many years, and was thereby particularly fitted to give evidence on the Netherlands Indies Law, whereas Dr. Veegens had not, nor had he learned, of the leading text book on the Mining Law.

In my view, this case is far less involved than the length of the record, the number of exhibits considered, the law discussed and the issues canvassed would lead one to suppose. On a first view, refined oil products in the possession and under the control of the Japanese military forces were *prima facie* property which properly could be seized by the British military forces without payment; but when it appeared that these refined products came from the claimants' oil fields, the problem of ownership and a right to compensation were, in my view, resolved. If the complicated theories of Dr. Veegens are put on one side, there remains the clear and reasoned opinion of Dr. Funke (supported by Dr. Nysingh) on the Mining Law and the Civil Code, which makes it clear that property in unextracted minerals is in the concessionaire from the day the concession is granted and that the Dutch Courts could not hold that property in the oil would be lost by the

application of an obsolete provision of the law, which would have the effect of giving rights in stolen property to thieves. *Specificatio* is a doctrine unknown to English Law, and property which has been changed remains the property of the owner and can be taken back when traced. In my judgment the doctrine of *specificatio* could not operate so as to give Japanese a title in the refined products.

I do not propose to discuss the effect of the Rehabilitation of Rights Ordinance, the Declaration of London, the Wartime Legal Relations Ordinance and the *Rose Mary*[17] case or to decide whether under the Singapore law oil is a *res nullius,* for these questions do not, if my view of the Netherlands Indies Law is correct, require to be considered. I think it clear that the Japanese acquired no rights of property in the crude oil or in the refined product, under the Hague Regulations, and that under the Netherlands Indies Municipal Law the claimants acquired rights of property in the unextracted and extracted oil which rights they never lost.

I would allow this appeal and enter judgment for the claimants-appellants for the amount claimed with costs here and below.

I would add that since writing my judgment I have had the advantage of reading the judgment of the learned President, who has considered fully the large number of subsidiary and alternative arguments advanced both by the appellants and the respondent. I am fully in agreement with his conclusions and the reasons therefor.

Whitton J. : —Before examining the legal problems which confront us I would observe that, except on one point, it seems to me the facts are sufficiently established to make it unnecessary to give them consideration in this judgment separately from the legal issues on which they have a bearing. The point to which I refer is the position with regard to crude oil in the reservoirs before it is extracted, a matter on which there is not much information before the Court. It was agreed by counsel before the close of the hearing of the Appeal that the crude oil in Sumatra is contained in reservoirs from which it does not escape except through wells drilled into the reservoirs, but it also appeared to be the case that, while all existing rights in regard to productive tanks were exclusively owned by the claimant companies, all the reservoirs were not necessarily wholly situated in the concession area. It cannot, therefore, be said in the light of these facts and in the absence of sufficient evidence as to the fugacity or otherwise of crude oil of this sort that all crude oil extracted in the oilfields covered by the concession must at all times before extraction have been in the concession area reservoirs.

I now approach the first main issue — whether the appellants had a title to the crude oil either "*in situ*" or on extraction. The Board did not reach an unanimous view on this issue, but considered a definite finding was not essential having regard to other conclusions it reached. Of the three witnesses expert in Dutch law who testified before the Board, Doctors Nysingh and Funke expressed the opinion that the claimants as concessionaires were owners of all oil extracted from the oilfields covered by the concession, this being so even if extraction was by a third party, while Dr. Veegens considered the claimants acquired no title to oil removed in the circumstances of this case. Before, then, this Court can hold Dutch law on this question has been satisfactorily proved it must feel there are conclusive grounds for accepting one or the other of these opposing opinions.

To take first the evidence of Dr. Nysingh, he expressed the opinion that a Netherlands Indies Court would hold that the claimants at all material times were the owners of the stocks which form the subject of this case, and that the Japanese had no title at all to the stocks. He went on to say his opinion was based on the general law in the Netherlands Indies and on special legislation enacted there during and after the war. Confining myself for the moment to the general law it is plain that Dr. Nysingh had mainly in mind the Netherlands Indies Mining Law, and he referred to sections 2, 5A, 7 and 13 in conjunction with Dr. Wally's affidavit as covering the grant of the right to acquire oil, and to section 16 as covering the concessionaire's rights after he had been granted the concession. In view of the wording of this section generally and of the phrase "exclusive right to extract" in particular Dr. Nysingh's statement that once the grant was made no one but the concessionaire had any right to dispose of the oil seems well supported. It is not at all clear, however, that the grant equally creates ownership in the oil before reduction into possession, and indeed Dr. Nysingh conceded that the question of property in minerals before extraction was an open one. Dr. Funke, who at one time practised in the Netherlands East Indies, associated himself with Dr. Nysingh's views as to the ownership of the extracted oil. He also did not claim the concessionaires had ownership before extraction. Dr. Veegens held the oil was a "*res nullius*" until extraction. In the light of these opinions I think it can be said at this stage that this Court, whatever construction it might be disposed itself to place upon the relevant statutes, would not be justified in holding ownership of the crude oil "*in situ*" had been proved according to Dutch law. But before forming a conclusion as to the position on extraction it is necessary to consider the

views of Dr. Veegens more fully. He thought the property in the oil was in the Japanese when they got the oil into the pipe lines which they were operating. The steps in his argument may be summarised as follows :—

(1) One has to look at the Mining Law to see to what extent property which would otherwise be in the owner of the ground has been dealt with by legislation, and the Mining Law took from the owner his right to the minerals.

(2) As the Mining Law clearly avoided determining ownership in them the minerals became *"res nullius"*.

(3) By virtue of Article 506(3) of the Netherlands Indies Civil Code the minerals are immovables before extraction but on extraction become movables.

(4) By Article 598 of the Code "movable things not belonging to anybody the title is acquired by the first occupant."

(5) The grant of a concession does not give such a title, and reduction into possession is essential to obtain title.

Before attempting to assess the values of these contradictory expert opinions I would observe it seems certain that, since there is no suggestion the Japanese set up new apparatus for extraction as distinct from restoring and rendering workable the claimants' apparatus, whatever element of fugacity crude oil may possess underground, and whether extraction be regarded as taking place when the oil enters the pipes while still many hundred feet down in the earth or only when it reaches the surface, the crude oil with which we are dealing must have been at the moment of extraction in a part of a reservoir, or in parts of reservoirs, included in the concession area. This being so I think it can at least be said that the views of Dr. Nysingh and Dr. Funke more closely accord with ordinary conceptions of ownership. It seems to me, however, that the conclusions of Dr. Veegens are, with respect to him, open to a more serious criticism. In the first place in relying on Article 585 of the Civil Code for the proposition that as movable things do not belong to anybody the title is acquired by the first occupant he fails, to my mind, to give due weight to the specific provisions of the Mining Law and the concessions. I do not doubt that cases of mussels and shells and deer in a deer-park may have a bearing in this connection but I venture to suggest the more logical approach must be first to see whether the law and instruments dealing with the subject in issue do not themselves give the answer to the problem. Examination of the document G.J.W. 2 attached to Dr. Wally's affidavit (we have been assured all the concessions may be regarded being in the same terms) shews the claimants were granted the exclusive right to produce and exploit, within the mining field, the minerals referred to in the deed granting the concession, and Dr. Wally himself states that at the date of the seizure by the Japanese on the basis of the laws in force in Indonesia at the time "no legal ownership of crude oil by means of exploitation of oilfields could be obtained by others than the aforementioned companies." Dr. Wally was an officer in, and eventually became head of, the Mines Department in Indonesia. He is not, apparently, a lawyer, but it is perhaps noteworthy that this statement was not given as an expression of opinion but as a declaration of fact. This evidence brings me to what I regard as a decisive point in the argument for the claimants. If the grant of the concession gave the concessionaires an exclusive right to dispose of ownership in the extracted oil, which it plainly did, it would seem to follow that it must have vested in them exclusive ownership in such oil. In this connection I find attractive the contention, though admittedly the weight which may be properly attached to it is open to doubt, of the Minister in charge of the introduction of the Mining Law that "whereas in normal usage it is assumed that occupation gives right to the *"res nullius"*, here it is the concession." Be this contention correct or not it seems to me a tenable view that the combined effect of the Mining Law and of the concession instruments is that the claimants had ownership conferred upon them, if they did not hav it previously, by the physical act of extraction, whethe by themselves or by a third party. If this view is correct it would seem to follow (assuming Dutch law on the matter to be the same as English — and we have had no evidence to the contrary) that these specific provisions of law must override the general provision of Article 585 of the Civil Code, in so far as it is inconsistent with them. As Article 585 makes "occupation" the sole test whereby title is acquired I do not think it has application to a case like this where an exclusive right of disposal, and consequently, in my view, of ownership, is created by the mining laws and the concessions. I consider, therefore, that the argument of Dr. Veegens breaks down at this point. I would add that I do not think what may be for convenience called the silver and zinc contention affects this conclusion, as it only applies to a statutory modification of the rights otherwise conferred by a concession when more than one concessionaire and more than one mineral is involved.

For these reasons I am prepared to accept the views of Drs. Nysingh and Funke and to hold it has proved under Dutch law the oil in question was at the date of extraction by the Japanese owned by the claimants-appellants.

The Board, while unable to agree on the issue of ownership at the date of extraction, proceeded to the finding that in any event the Japanese acquired a title by reason of the doctrine of *'specificatio'*. This old

doctrine is seldom heard of in the every day practice of Dutch Courts, but it is also clear that it was still part of the law of the Netherlands East Indies. It is contained in section 606 of the Civil Code :—

> "He who makes of a material not belonging to him a thing of a new sort, becomes the owner of such thing, provided he pays the price of the material, and if there are grounds for so doing, makes good the costs, damages and interest."

It is common ground that, despite the proviso, non-payment does not prevent ownership passing. Dr. Veegens expressed the view :—

> "It" (Section 606) "does not distinguish whether the making of the material is on a small scale or a great scale, whether it is incidental or in the course of running an enterprise. It does not distinguish in which way the maker obtains possession of the material."

He considered that the refining of the oil into gasoline and diesel oil in the present case was "without the slightest doubt" a case of *"specificatio"*, and said that aviation gasoline became a thing of a new sort when it was refined. Applying the rules of *"specificatio"* to this case he maintained the property in all the products was so acquired by the Japanese if not otherwise.

Dr. Veegens's conclusions on this point were attacked on at least four grounds firstly, that the physical change in the crude oil was not of a kind to effect *"specificatio"*; secondly, the doctrine had no application to the seizure of the property of an *"universitas rerum"* as occurred in this case; thirdly, even if *"specificatio"* had taken place its legal effects were nullified by subsequent legislation; and fourthly, in any event the doctrine had no relation to a case like this where International Law was applicable.

The two experts called by the appellants expressed views very diverse from those of Dr. Veegens on this matter, and in particular they maintained the doctrine of *"specificatio"* could not apply to an *"universitas rerum"*. Dr. Funke based his argument on a quotation from a commentary by Professor Meijers on the Professor's own draft of a new Civil Code to the effect that the rule governing an *"universitas rerum"* entails that a person who has a right to the universality can enforce a similar right to the goods which have taken their place; and the witness illustrated his interpretation of the rule by giving as an example that if bandits took over a factory and ran it for a time but were then expelled they could never claim title to the products produced when they were in occupation.

I am not convinced that Dr. Funke succeeded in establishing his point that Professor Meijer's proposed legislation on this subject was merely a question of codifying existing law, though I do not doubt it embodied a principle which was, to a greater or less degree, recognised by Dutch jurists. Again I think that neither Dr. Nysingh nor Dr. Funke replied very successfully to the contention that the Explanatory Memorandum to the Rehabilitation of Rights Ordinance shewed section 48 of the Ordinance had been enacted to avoid the effects of *"specificatio"* which would have otherwise resulted under the general law in certain cases where the Japanese had seized business enterprises. On the other hand I think the appellants appeared to the greater advantage in the arguments based on the War-time Legal Relations Ordinance, 1940, and especially in their submission that an "act-in-law" is specifically so described in the Ordinance where it is meant, from which it was to be implied that what sections 6 and 7 hit at was the act and not the persons doing it, and that consequently the turning by the Japanese of the crude oil into various types of petrol was a prohibited act. Nevertheless, whichever views on this matter one is disposed to regard as the more persuasive, I think it is true to say in the face of such contradictory expert opinion, and that on a section of the law little encountered in practice and now relied upon relative to abnormal circumstances, Dutch law as far as this part of the case is concerned has not been proved. In that situation it is for the Court to apply English law. The applicable English principle is stated in *In re Oatway*[13]. I think it is clear that under English law ownership could not have been extinguished by the process of refining carried out in this case. I am of the opinion, therefore, that the Japanese cannot correctly be held to have acquired ownership by *"specificatio"*. For reasons I shall presently indicate I also think that if the Japanese did not acquire ownership by *"specificatio"* there was no other way in which in the circumstances they could have acquired it.

In approaching the subject of the applicability of the Hague Regulations I would make the general observation that I do not think there is any ground on which this Court need hesitate to associate itself with the *dictum* of the Tribunal in *Krupp's*[6] case (Ex. 5, p. 622), a *dictum* which merely confirmed what the International Military Tribunal had already held, that the doctrine the provisions of Hague Convention No. IV and the Regulations attached to it do not apply in "total war" must be emphatically rejected. In this connection it is to be borne in mind that Japan, like Germany, was a signatory to the Hague Convention. Akin to this view is the conception that even a State waging illegal war is entitled to the benefit of the Hague Regulations, a conception which appears to have been acted upon by European Courts dealing with cases arising out of the second World War, and which has now received the authority of Dr. Lauterpacht's acceptance. Now turning to the Regulations themselves we find a general protection is given to private

property by Article 46. An army of occupation may, nevertheless, seize, subject to certain conditions, by virtue of the second paragraph of Article 53, certain kinds of private property including "all kinds of ammunition of war". The legality or otherwise of the seizure of this crude oil mainly turns on the issue whether crude oil is a munition of war — a "*munitions-de-guerre*" in the original text. I say "mainly" because even if the seizure was *prima facie* covered by the Regulations the question of compliance with the prescribed conditions must not be overlooked. Our task is not made the easier, unfortunately, by the opinions advanced in some quarters that the Regulations are to be interpreted more widely than formerly to meet modern conditions. In this connection the Tribunal in *Krupp's*[6] case in 1948 expressed the view:—

> "The Articles of the Hague Regulations quoted above" — this included Article 53 — "are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down by the Regulations."

A similar view on the part of the International Military Tribunal is quoted by Dr. Lauterpacht in the "Annual Digest and Reports of Public International Law Cases" (Ex. X 10, p. 672). Again it was said by the United States Military Tribunal at Nuremberg (X 11, p. 358):—

> It has been earnestly contended by the defense that the rules of belligerent occupation have, in fact, been greatly relaxed and that the defendants could not properly be convicted on the basis of the law in force at the time of the alleged misdeeds. We have considered this defense and the arguments waged in support thereof. We find no adequate justification for the position thus taken."

In the sphere of municipal decisions the Dutch case of *Esau*[18] (Ex. 62) and the Norwegian case of *Johansen*[19] (Ex. 73) do not suggest the Courts which heard them considered the Hague Regulations were to be interpreted differently from before. I conclude, accordingly, there are not grounds for holding Article 53 is to be interpreted less strictly than before.

The appellants relied strongly on the argument that plants and installations are not "*munitions-de-guerre*" because of their immovable nature, and that consequently crude oil whether in the original reservoir or after extraction cannot be "*munitions-de-guerre*" before it is refined. Emphasis was laid on the fact that crude oil cannot be used for defence or offence until processed, and, moreover, other elements have to be mixed with it before it can become available for military use. In connection with this argument it was pointed out that it has never been suggested coal is a "*munitions-de-guerre*".

In a case like this where it is arguable if the property falls within the scope of Article 53 it seems to me the most satisfactory test is to pose the question whether it is the sort of property the signatories to the Hague Convention intended should be protected for seizure. In 1907 the horse and the steam-engine were still the main propelling forces used in land transport, and in wars up to that time the part played by mechanical transport was scarcely more than ancillary — getting the soldiers and their equipment to the field of battle. Yet seizure of appliances for transport, which was, of course, chiefly railways, was authorised, even if private property. By 1939 petrol-driven vehicles had themselves become the central element in a specialised form of military operation, as the German invasion campaigns in Poland and Western Europe demonstrated, and the aeroplane had become a major factor in warfare. These changes in the nature of warfare necessarily make it more difficult to determine whether crude oil is a "*munitions-de-guerre*". It seems to me, however, had the Japanese been fortunate enough in 1942 after capturing Singapore to find in the place this petrol ready for use, as the British Military Administration found it in 1945, it could not be correctly maintained it would have been a violation of Article 53 had they employed it for the purposes of their campaigns. If it is conceded a belligerent is entitled to seize petrol which is ready for immediate use it seems to me it cannot be logically maintained he is not entitled to seize the crude material out of which the finished products are created, since the protection accorded private property by the Regulations is obviously limited by the exclusion of what the signatories to the Convention presumably regarded as the legitimate necessaries of a belligerent occupier in the execution of his war effort, as the modern phase has it, and once it is allowed that a certain kind of property is a necessary for the conduct of a war there scarcely seems reason to maintain that private interest can prevail in respect of the raw material out of which the property is made simply because in such circumstances extraction and processing have first to be carried out. It is true, in this connection, that an undoubted difficulty in the Crown's submission that the seizure was legal under Article 53 is the statement in the Manual of Military Law that private property falling within this category must be susceptible of direct military use. It cannot be said that the crude oil would under any circumstances have been readily susceptible of direct military use, even though the denial action taken by the Dutch authorities necessitated more complicated steps to render it fit for that purpose than would otherwise have been required. Nevertheless had this been the only obstacle to accepting the Crown's contention I should have been inclined to hold that, having regard to the exigencies of modern warfare and the nature of this particular product, this aspect of the matter was not necessarily fatal to the

Crown's case. It must be recognised, however, that in several ways the seizure violated the Regulations. In the first place there is nothing in the circumstances to suggest the Japanese were seeking to observe the terms of the Hague Convention. Secondly, whether a receipt is essential or not, it seems clear some record of goods removed must be kept if the protection contemplated for private property under the Regulation is to have reality, and there is no evidence the Japanese attempted to do this. Again it is plain that a considerable portion of the crude oil removed was directed to purposes which could not in any sense be said to fall within the classification of military necessity. For these reasons I have formed the conclusion the seizure was in contravention of Article 53 and illegal.

The relevant portion of Article 53, moreover, requires that property seized within its terms must be restored and compensation paid on the conclusion of peace. In this connection it was argued on behalf of the appellants, convincingly to my mind, that a seizure under the Article never transfers title, and that in the case of an expendable product the occupier is under a duty to return to the owner at the end of hostilities the unexpended portion. Having regard to this aspect of the matter I think that, even if the seizure had been lawful under the Regulations, the Japanese, and consequently the Crown were under an obligation to restore, or to pay compensation for, the oil which remained.

In conclusion I proceed to consider the effects of the Inter-Allied Declaration. The attitude adopted by the Crown over this claim was criticised strongly on moral grounds as well as legal, and in particular it was suggested it was in flagrant disregard of the obligations undertaken by His Majesty's Government in the Inter-Allied Declaration of 1943 (Ex. 1). From the document itself we learn that it was a formal declaration by the British Government and the sixteen other Governments who were also parties to it "of their determination to combat and to defeat the plundering by the Enemy Powers of the territories which have been overrun or brought under enemy control". This language, it may be said at once, does not suggest that a lawful seizure under Article 53 of the Regulations would be within the scope of the enemy actions it was intended to defeat. If, however, the seizure in the present case was not legal under the Regulations it was a form of looting, and from the last line of the Note attached to the Declaration clearly an act covered by the Declaration. The appellants relying on the contention that the seizure was unlawful submitted that by virtue of the Declaration the Crown had stated in advance they would not recognise illegal transfer of private property in occupied territory, and that, therefore, to maintain they were entitled to seize the oil as war booty was a violation of a solemn undertaking. The Crown in effect reply that as a matter of construction Ex. 1 was only a declaration of present intention to do something in the future, and not in itself binding. It was, they say, a general statement of attitude, and not something to which contractual effect can be given. Examination of the Declaration must, I think, support this view, and on the evidence before us there seems to be very little ground for any assumption that the parties ever subsequently took steps to give it practical effect. In particular it is noteworthy that they "reserved their right" to declare transfers invalid. The Note states, "It is obviously impossible for a general declaration of this nature to define exactly the action which will require to be taken when victory has been won .....". I find it difficult to resist the conclusion that the Governments concerned clearly contemplated additional action before their undertaking was to become operative, and, much though it may be regretted that the Declaration seems to have remained an expression of laudable intentions, this circumstance does not alter the point that the onus of proving it had treaty effect has not, in my opinion, been discharged by the appellants. But, as may be inferred from the views I have expressed on the legal aspects of the seizure, I do not think the appellants have to rely on the Declaration to succeed.

For these reasons I would allow this appeal, with costs of this Appeal and of the proceedings before the Board to the appellants.

Appeal allowed.

Solicitors: *Drew & Napier.*